

No. 12,679

IN THE

United States

Court of Appeals

For the Ninth Circuit

HOWARD BROWN, individually and as surviving partner of the copartnership of Sinton & Brown, Dean Brown and Howard S. Brown, Florence R. Sinton and Silas D. Sinton, Jr., as Executors of the Estate of Silas D. Sinton, deceased, as members of and constituting the partnership known as Sinton & Brown,

Appellants-Defendants,

VS.

COWDEN LIVESTOCK CO., a corporation,
Appellee-Plaintiff

APPELLEE'S PETITION FOR REHEARING

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Appellee-Plaintiff

APPELLEE'S PETITION FOR REHEARING

To the Honorable United States Court of Appeals for the Ninth Circuit and the Judges thereof:

Comes now Cowden Livestock Co., the appellee herein, and presents this, its petition for a rehearing of the above-entitled cause, and in support thereof, respectfully shows:

I

The premise upon which the decision of this Court reversing the judgment below is based, i.e., that the creation of the relationship of creditor and debtor between appellee and Adams *ipso facto* released appellant from the obligation of payment of its debt to appellee, is erroneous and unsound.

In the absence of an agreement that the old obligation should be extinguished and a new one substituted, a novation will not be implied from the mere acceptance by the creditor of the obligation of a third person. If no more appears than that the creditor has taken the negotiable instrument of a third person who has assumed the debt, that fact does not operate as a novation releasing the old debtor, but such new obligation will be considered only as a conditional payment or a collateral security.

66 C.J.S., Sec. 18(e), pp 703, 704;

L.R.A. 1918B, p. 113 et seq.;

City National Bank of Huron v. Fuller, 52 F. 2d 870, 875 (C.C.A. 8, 1931);

Kirkman v. Farmers Savings Bank, 28 F. 2d 857, 861, 862 (C.C.A. 8, 1928);

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Denman v. Bruce-Rogers Co., 190 Ark. 1098, 82 S.W. 844, 846 (1935).

In the case at bar, there is no evidence whatever in the record that appellee ever agreed to release the obligation of appellant or to substitute Adams in the place of appellant. To the contrary, the evidence is undisputed, and the court below found, that ap-

pellee received Adams' check conditionally upon its being paid when presented (R. 36, 97, 98).

II

The holding of the Court to the effect that appellee by its dealings with Adams on July 16th ratified Adams' conduct in receiving collections from appellant, is at variance with the rule established by practically all of the courts of the United States—including this Court—that ratification of the unauthorized act of an agent is not possible unless at the time he was doing the act the agent purported to be acting for and on behalf of his principal.

Although it is stated at one point in the opinion in this case (p. 5, last paragraph), that a decision upon the question of ratification is unnecessary, the Court has in fact decided (p. 6) that appellee could and did ratify or "retroactively give its consent" to Adams' unauthorized acts in making collections from appellant. Obviously, consent retroactively given is but another way of expressing the term "ratification", since the substance of the doctrine of ratification is the idea of confirmation after conduct.

Thus, although it is beyond dispute that Adams never purported to appellant to be other than the sole owner of appellee's cattle at the time he received the collections from appellant, we have here a decision by the Court that appellee could and did, by its conduct on July 16th, ratify the acts of Adams in making the collections. The unsoundness of such a holding is, we feel, amply demonstrated by our argument under Proposition IV of our Appellee's Brief (pp. 11-14), but we desire to supplement the same with the following citations:

124 *A.L.R.* p. 893 et seq.;

Pullen v. Dale, 109 F. 2d 538, 539 (C.C.A. 9, 1940).

Wherefore, upon the foregoing grounds, it is respectfully urged that the petition for a rehearing be granted, and that the judgment of the District Court be upon further consideration affirmed.

Respectfully submitted,

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JAMES A. WALSH

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Attorneys for Appellee-Plaintiff

CERTIFICATE OF COUNSEL

I, James A. Walsh, counsel for the above named Cowden Livestock Co., appellee, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

JAMES A. WALSH

Counsel for Cowden Livestock Co.,
Appellee.